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Convicted dope dealer finds unusual ally

Remember this old chestnut from law school? The professor describes a state prosecution with a plethora of problems surrounding the indictment. She then asks, "How many violations of the Fifth Amendment indictment clause can you identify?"

The answer is simple: zero. That's because the Fifth Amendment's indictment clause applies only to federal prosecutions. The U.S. Supreme Court has never selectively incorporated that clause to the states through the 14th Amendment due process clause. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884).

You may think that the indictment clause is the exception that proves the rule and that all other criminal rights have been incorporated. If so, you need to take a look at *Tyson Timbs and a 2012 Land Rover LR2 v. Indiana*, a case that will be decided next term by the U.S. Supreme Court (No. 17-1091). This case will determine whether the Eighth Amendment's excessive fines clause should be made applicable to the states through selective incorporation.

Tyson Timbs pleaded guilty to one count of dealing heroin and a second count of conspiracy to commit theft. He received one year of home detention and five years of probation. Although the maximum fine was \$10,000, Timbs was actually assessed a little over \$1,000 in fines.

But it did not end there. Several months later, a private law firm filed a case seeking to forfeit the Land Rover worth \$42,000 that Timbs was driving at the time of his arrest.

The trial judge refused to order the forfeiture. The court noted that the value of the vehicle was more than 400 percent higher than the maximum monetary fine Timbs could have received. Consequently, it found that the forfeiture violated the Eighth Amendment's excessive

fines clause.

However, the Indiana Supreme Court unanimously reversed. That court held that the U.S. Supreme Court had never explicitly incorporated the excessive fines clause to the states. Because that court had not mandated that states were bound by the clause, the Indiana Supreme Court refused to impose it on itself.

Timbs' cert petition acknowledges that there is legal confusion over whether the U.S. Supreme Court has ever incorporated the clause to apply to the states. It notes that two federal circuits and 14 states have declared that the clause has been incorporated. (One of these states is Illinois. The state Supreme Court held this in *People ex rel. Waller v. 1989 Ford F350 Truck*, 642 N.E.2d 460 (1994)).

On the other hand, four states (including Indiana) have held that the clause is not binding on the states because it has never been incorporated by the Supreme Court.

Timbs emphasizes that the Eighth Amendment forbids three separate actions: cruel and unusual punishment, excessive bail

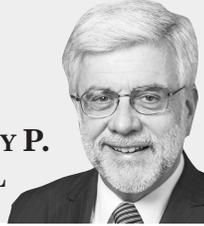
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and excessive fines. There is no question that the court has explicitly incorporated the first two. And the petition cites a number of Supreme Court cases that have noted that the three guarantees work in tandem to forbid governments from imposing unreasonable punishments.

The petition then points to recent scandals showing why the prohibition against excessive fines is fundamental to due process. For example, the Department of Justice found that it was a long-standing policy of Ferguson, Mo., to use law enforce-

CRIMINAL PROCEDURE

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ment policies as a way of maximizing revenue in lieu of taxes. This constitutes a particularly regressive way to fund local government.

And forfeitures, as in this case, are particularly abusive. Justice Clarence Thomas has written that they "frequently target the poor and other groups least able to defend their interests." *Leonard v. Texas*, 137 S.Ct. 847, 848 (2017) (Thomas, J., statement respecting denial of certiorari). And, as Timbs' case

illustrates, the prosecutor is allowed to "outsource" forfeiture cases to private firms. Even worse, the firms work on a contingent fee basis, which has allowed Indiana firms to pocket hundreds of thousands of dollars in recoveries.

So which side will win?

I expect that the Supreme Court will unanimously hold in favor of Timbs. And the reason I believe it will be unanimous is based on an amicus brief that was filed in support of Timbs' petition for cert.

This particular amicus brief

was not filed by one of the "usual suspects" in support of criminal defense. In fact, it would be hard to find a stranger bedfellow. That's because the amicus that I believe will result in a unanimous defense victory was filed by none other than the U.S. Chamber of Commerce.

Wait ... what?

While supportive of Timbs, the chamber's argument stresses that "Across the country, state and local prosecutors are targeting large and small businesses for similar treatment." This has resulted in "large fines being handed out for even the smallest of violations at great cost to businesses and their customers all because decision-makers have been persuaded to invoke the 'deep-pockets' theory of corporate exposure."

The brief then catalogs the cases it contends are most abusive. It highlights a case from Texas in which it contends a county hired private counsel who sought approximately \$2 billion in fines from a landowner for improperly storing a pile of wood on his property.

A defendant who has the support of the chamber in a case before the Supreme Court can rest a lot easier. The Roberts Court since 2006 has sided with the chamber in 70 percent of the cases in which it has been involved.

Compare this with the Rehnquist Court's favoring the chamber 56 percent of the time between 1995 and 2005 and the Burger Court's rate of only 43 percent between 1981 and 1986. (See "Kavanaugh Will Fit Right In," New York Times editorial, July 23, 2018.)

Combining a good set of facts for the defense with the support of the chamber of commerce is hard to beat. Look for the Supreme Court next term to selectively incorporate one more right from the Bill of Rights. And don't be surprised if it's unanimous.